Supreme Court, U.S.
FILED
JAN 27 1995
OFFICE OF THE CLERK

No. 94-959

In the Supreme Court of the United States

OCTOBER TERM, 1994

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

MICHAEL J. ZEVENBERGEN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

15

QUESTION PRESENTED

Whether the Environmental Protection Agency properly denied petitioner's request for an evidentiary hearing on petitioner's application for a modification of the Clean Water Act's secondary treatment requirements.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Baltimore & A. R.R. v. *Washington Metro. Area Transit Comm'n*, 642 F.2d 1365 (D.C. Cir. 1980)	8
Costle v. *Pacific Legal Found.*, 445 U.S. 198 (1980)	7
E.I. duPont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977)	2
John D. Copanos & Sons v. *FDA*, 854 F.2d 510 (D.C. Cir. 1988)	9
Smithline Corp. v. *FDA*, 587 F.2d 1107 (D.C. Cir. 1978)	9
Weinberger v. *Hynson, Wescott & Dunning*, 412 U.S. 609 (1973)	9

Statutes, regulations and rule:

Clean Water Act, 33 U.S.C. 1251 *et seq.*	2
§ 301, 33 U.S.C. 1311	2
§ 301(b)(1)(B), 33 U.S.C. 1311(b)(1)(B)	2
§ 301(h), 33 U.S.C. 1311(h)	2, 3
§ 301(h)(2), 33 U.S.C. 1311(h)(2)	2, 3, 4
§ 304, 33 U.S.C. 1314	2
§ 304(d), 33 U.S.C. 1314(d)	2
§ 402, 33 U.S.C. 1342	2
§ 509(b), 33 U.S.C. 1369(b)	5
40 C.F.R.:	
Sections 124.71-124.91	4
Section 124.75(a)(1)	4, 5, 7
Section 125.58(t)	3
Section 125.61(f)	3, 4, 8
Section 125.61(f)(3)	8, 9

Rule—Continued: Page

Fed. R. Civ. P.:
Rule 56 ..... 5, 6
Rule 56(c) 5

Miscellaneous:

44 Fed. Reg. (1979):
p. 34,784 3
p. 34,806 3

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-959

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 35 F.3d 600. The orders of the Environmental Protection Agency's Environmental Appeals Board (Pet. App. A26-A32, A33-A61) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1994. The petition for a writ of certiorari was filed on November 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, imposes pollution controls, known as secondary treatment requirements, on discharges from many publicly owned treatment works (POTWs). See CWA §§ 301(b)(1)(B), 304(d), 33 U.S.C. 1311(b)(1)(B), 1314(d). Petitioner requested the Environmental Protection Agency (EPA) to modify the secondary treatment requirements that would otherwise apply to the discharge of pollutants from petitioner's POTW in Mayaguez, Puerto Rico. See CWA § 301(h), 33 U.S.C. 1311(h). The EPA denied that request, finding that petitioner had failed to raise a genuine issue of material fact warranting an evidentiary hearing. Pet. App. A33-A61; see also *id.* at A26-A32. The court of appeals affirmed. *Id.* at A1-A25.

1. Section 402 of the CWA, 33 U.S.C. 1342, regulates discharges of pollutants from petitioner's POTW through the National Pollution Discharge Elimination System (NPDES) permit program. Among other things, NPDES permits incorporate pollution control requirements that reflect various levels of technology. See generally CWA §§ 301, 304, 33 U.S.C. 1311, 1314; *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 126-136 (1977). For POTWs such as petitioner's, the CWA specifies the applicable technology-based control standard as the degree of effluent reductions attainable through "secondary treatment." CWA § 301(b)(1)(B), 33 U.S.C. 1311(b)(1)(B).

Section 301(h) of the CWA allows a POTW that discharges into marine waters to obtain a permit that modifies secondary treatment discharge requirements if the applicant satisfies nine statutory requirements. CWA § 301(h), 33 U.S.C. 1311(h). Subsection (h)(2), the

provision that is relevant to this petition, requires an applicant to show that its discharge under the modified requirements "will not interfere, alone or in combination with pollutants from other sources," with the attainment of water quality that assures "the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife." CWA § 301(h)(2), 33 U.S.C. 1311(h)(2).

The EPA has promulgated regulations implementing subsection (h)(2) that include special requirements for discharges into "stressed waters." See 44 Fed. Reg. 34,784, 34,806 (1979). The EPA defines "stressed waters" as receiving environments in which lack of a balanced, indigenous population is "caused solely by human perturbations other than the applicant's modified discharge." 40 C.F.R. 125.58(t). In the case of those waters, an applicant may obtain a Section 301(h) modification only upon demonstrating to the EPA's satisfaction that the modified discharge does not or will not:

> (1) Contribute to, increase, or perpetuate such stressed conditions;
>
> (2) Contribute to further degradation of the biota or water quality if the level of human perturbation from other sources increases; and
>
> (3) Retard the recovery of the biota or water quality if the level of human perturbation from other sources decreases.

40 C.F.R. 125.61(f).

As petitioner concedes, the waters that receive discharges from petitioner's POTW qualify as "stressed waters" because heavy sediment loadings from various

sources have adversely affected nearby coral reefs. Pet. App. A46. To obtain a Section 301(h) modification, petitioner was therefore required to show, in accordance with 40 C.F.R. 125.61(f), that its modified discharge would not contribute to the stressed conditions of the coral reefs in the present and would not cause further degradation or inhibit recovery of the reefs if the level of stress from other sources changes in the future. The Regional Administrator for EPA Region II denied petitioner's CWA Section 301(h) application based on petitioner's failure to meet the requirements of subsection (h)(2) and the associated regulations governing "stressed waters." Pet. App. A42.

2. Petitioner contested the Regional Administrator's denial of the Section 301(h) application by requesting an evidentiary hearing pursuant to the NPDES permit procedures set out at 40 C.F.R. 124.71 to 124.91. With its request for an evidentiary hearing, petitioner submitted a draft study conducted by the United States Geological Survey (USGS) that examined, among other things, the effects of petitioner's discharge on the stressed coral reef communities. Pet. App. A6. The Regional Administrator denied petitioner's request for a hearing, finding that the USGS study and earlier studies were insufficient to make the "stressed waters" showings required by 40 C.F.R. 125.61(f). Pet. App. A6, A36, A44-A45.

Petitioner sought review of EPA Region II's denial of an evidentiary hearing from the EPA's Environmental Appeals Board. The Board upheld EPA Region II's decision, concluding that petitioner had failed to establish that the dispute presented "material issues of fact relevant to the issuance of the permit." 40 C.F.R. 124.75(a)(1). The Board explained that the EPA's regulations required petitioner to show, among other

things, that its discharges would not retard recovery of the stressed coral communities if stress from other sources decreased in the future. 40 C.F.R. 125.61(f)(3). The Board found that the studies submitted by petitioner, including the USGS study, failed to address the issue of future impacts, Pet. App. A52-A56, and that there accordingly was "no genuine issue of material fact warranting an evidentiary hearing," *id.* at A57.

3. Petitioner requested the court of appeals to review the EPA's administrative decision. See CWA § 509(b), 33 U.S.C. 1369(b). Petitioner contended that the EPA had employed an inappropriate standard for determining whether to conduct an evidentiary hearing and that the EPA had erred in concluding that petitioner had not submitted sufficient information for the agency to rule in petitioner's favor. The court of appeals rejected those arguments. Pet. App. A1-A25.

The court of appeals concluded that the EPA's regulation governing evidentiary hearings, which allows the EPA to dispense with a hearing unless there are "material issues of fact relevant to the issuance of the permit" (40 C.F.R. 124.75(a)(1)), operates much like Federal Rule of Civil Procedure 56(c), which authorizes summary judgment if there is "no genuine issue as to any material fact." The court ruled that the EPA had properly relied on principles established under Rule 56 to hold that petitioner was not entitled to an evidentiary hearing unless it established as a threshold matter that its claim rests on a factual dispute that is both "genuine"—*i.e.*, sufficiently debatable to warrant a hearing—and "material"—*i.e.*, relevant to the outcome of the case. Pet. App. A9-A16. The court noted that the EPA's application of those principles here was consistent with its established practices. *Id.* at A16-A20.

The court of appeals also rejected petitioner's argument that there was sufficient evidence in the record to warrant an evidentiary hearing. The court agreed with the EPA's determination that the studies submitted by petitioner—including the USGS study—"addressed only the current impacts of the facility's emissions relative to the current impacts of all other emissions, and did not purport to make predictions about future impacts." Pet. App. A21. The court found the EPA's "rendition of the evidence to be faithful to the record, its reasoning to be sound, and its position to be well-supported by authority." *Id.* at A24-A25.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The decision turns on the particular circumstances of this case and presents no question of general importance warranting review by this Court.

1. Petitioner objects to EPA's use of the summary judgment standard set out in Rule 56, Fed. R. Civ. P., for determining whether to grant an evidentiary hearing. Pet. 17-25. Petitioner contends that the court of appeals "has permitted the EPA to depart without proper notice or any explanation of its legal reasons from the evidentiary standard explicitly articulated in its regulation." Pet. 17 (capitalization altered from original). According to petitioner, the court and the EPA should not have relied on the principles developed under Rule 56, because "[t]he plain language of the regulation demonstrates that EPA used the words 'material issues of fact,' not the words 'genuine issue of material fact,' to describe the burden for obtaining an evidentiary hearing." Pet. 18.

The court of appeals correctly rejected that argument. As the court explained, there is no reason to attach

talismanic significance to the absence of the word "genuine" in the EPA's regulations. Pet. App. A10-A11. The EPA reasonably interprets the relevant phrase in its regulation—"material issues of fact" (40 C.F.R. 124.75(a)(1))—to refer to matters that are susceptible to debate. "To force an agency fully to adjudicate a dispute that is patently frivolous, or that can be resolved in only one way, or that can have no bearing on the disposition of the case, would be mindless, and would suffocate the root purpose for making available a summary procedure." Pet. App. A10. See *Costle* v. *Pacific Legal Found.*, 445 U.S. 198, 214 (1980) (reaffirming in the NPDES context that an applicant who seeks a hearing must "meet a threshold burden of tendering evidence suggesting the need for a hearing").

Contrary to petitioner's assertions (Pet. 19-20, 23-25), the EPA's interpretation of its regulation is not a departure from past practice. As the court of appeals explained, "the record reflects neither a departure from precedent nor an alteration of the required showing." Pet. App. A17. Although the EPA has not previously "made the equation between Rule 56 and EPA's summary judgment procedure so explicit, it traditionally has equated its procedural standard for denial of an evidentiary hearing [on] an NPDES permit with the Rule 56 yardstick." *Ibid.* (citing EPA administrative decisions). Thus, "any reasonable litigant familiar with administrative practice in general and with EPA's precedents in particular should have anticipated that it would be required to present evidence adequate to overcome the functional equivalent of a Rule 56 motion." *Id.* at A19.

Petitioner is mistaken in asserting (Pet. 20-22) that the court of appeals' decision in this case conflicts with the decisions of other courts of appeals. Petitioner bases

its claim of a conflict on cases holding that administrative agencies must articulate an adequate explanation for changes in established standards and policies. See, *e.g.*, *Baltimore & A. R.R.* v. *Washington Metro. Area Transit Comm'n*, 642 F.2d 1365, 1370 (D.C. Cir. 1980). The court of appeals in this case expressly recognized that principle. See Pet. App. A16-A17 (observing that "an agency 'cannot depart significantly from prior precedent without explicitly recognizing that it is doing so and explaining why' "). The court correctly concluded, however, that the EPA did not violate the precept, because the EPA's decision "was consistent both with its prior practice and with prevalent understandings of administrative summary judgment." *Id.* at A19.

2. Petitioner further contends that the court of appeals failed to accord "proper deference" to the scientific expertise of the USGS. Pet. 25-27. The USGS's scientific expertise, however, was not at issue in this case. The pivotal issue before the EPA was whether petitioner had made a threshold showing that its discharges under the proposed modification would satisfy the stressed water criteria set out in 40 C.F.R. 125.61(f). The EPA concluded that petitioner had failed to provide, among other things, a factual basis for asserting that the discharge would not "[r]etard the recovery of the biota or water quality if the level of human perturbation from other sources decreases." 40 C.F.R. 125.61(f)(3). The EPA found that the USGS study did not provide an adequate evidentiary foundation for a hearing, because the study did not address the question of "future" impacts. Pet. App. A54-A55. Indeed, the USGS study expressly stated that, even in the case of present impacts, "[f]urther detailed work with additional stations is needed to assess the hypothesis of damage by

the outfall." Pet. App. A56 (quoting USGS study). Thus, the EPA found the USGS study inadequate for purposes of the CWA Section 301(h) application because it failed to address a fundamental issue and not because the USGS lacked scientific expertise. See also Pet. App. A28, A43 & n.10, A54-A57. The court of appeals agreed with the EPA's judgment on that factbound matter, see *id.* at A20-A25, and the issue does not warrant this Court's review.

3. Petitioner also contends that the decision below conflicts with this Court's decision in *Weinberger* v. *Hynson, Wescott & Dunning*, 412 U.S. 609 (1973), which upheld the Food and Drug Administration's practice of denying a hearing on a "new drug application" if the applicant failed to make a threshold factual showing that the drug was effective. See *id.* at 620-622. In reaching that decision, the Court noted that administrative summary judgment may not be appropriate if the agency's approval standards are so imprecise that it is not "possible to tell from the face of a study whether the standards have been met." *Id.* at 621 n.17. Petitioner contends that that dictum applies here because the EPA's future impacts regulation, 40 C.F.R. 125.61(f)(3), does not provide a precise standard. Pet. 27-29.

The court of appeals acknowledged that an imprecise regulation may require an agency to give a party requesting an evidentiary hearing "the benefit of the doubt." Pet. App. A22-A23 (citing *Weinberger* v. *Hynson, Wescott & Dunning, supra*). That court additionally recognized, however, that even if the substantive regulation is imprecise, the factual record may nevertheless "be so clear-cut as to warrant summary adverse action." Pet. App. A23. Accord *John D. Copanos & Sons* v. *FDA*, 854 F.2d 510, 522 (D.C. Cir. 1988); *Smithkline Corp.* v. *FDA*, 587 F.2d 1107, 1116-1119 (D.C. Cir. 1978). The court properly concluded that "the

present case falls into the heartland of the latter category." Pet. App. A23; see also *id.* at A28 ("the Board held that [petitioner] had failed to present any evidence to show that its discharge would not retard recovery of the biota if existing sources of pollution were to decrease in the future").

Petitioner has conceded that the USGS study did not address future impacts. See Pet. App. A23. Petitioner nevertheless contends that the USGS's "historical and empirical methodology * * * provided a scientific basis for the reasoned prediction necessary for [a 40 C.F.R. 125.61](f)(3) [determination]." Pet. 29. Petitioner's predictions, however, are not evidence. Those predictions, which are simply speculations of counsel that go beyond the express scope of the USGS study, have no demonstrated validity. See Pet. App. A54-A55; see also *id.* at A70-A71 (explaining that the USGS study "was limited to" certain specific subjects). The EPA was not obligated to give credence to petitioner's unsupported speculations, and its refusal to do so does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

MICHAEL J. ZEVENBERGEN
Attorney

JANUARY 1995